United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 74-2211

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

LODGES 700, 743, AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly found that certain allegations of the complaint were effectively disposed of by an arbitrator's award that satisfies the standards set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080.

2. Whether the Board properly deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the remaining disputes through the grievance and arbitration procedure of the collective bargaining agreement, pursuant to the policies expressed in *Collyer Insulated Wire*, 192 NLRB 837.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Lodges 700, 743, and 1746, International Association of Machinists & Aerospace Workers AFL-CIO (hereafter "the Union") to review a decision and order of the National Labor Relations Board dismissing an unfair labor practice complaint against the United Aircraft Corporation, Pratt & Whitney and Hamilton Standard Divisions (hereafter "the Company"). The Board's decision and order (J.A. 121-132)[1] issued on September 3, 1974, and is reported at 213 NLRB No. 22. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The underlying dispute concerns the Company's Pratt & Whitney Division plants at East Hartford and Middletown, Connecticut, and its Hamilton Standard Division plant at Windsor Locks, Connecticut (J.A. 37, 40-41, 7-9). The Company is engaged in the manufacture and sale of aircraft engines, helicopters, aircraft accessories and parts, and electronic devices and components, in a manner affecting interstate commerce (J. A. 6, 11).

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[1] "J.A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

The Board[2] found that certain allegations of the complaint were effectively disposed of by an arbitrator's award, which satisfies the standards set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and that the other issues raised by the complaint could also be appropriately resolved through the grievance and arbitration procedure of the collective bargaining agreement (J.A. 126-128). Accordingly, the Board deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the remaining disputes through their contractual procedure (J. A. 128-129). The Board dismissed the complaint but retained jurisdiction pursuant to the policies expressed in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The underlying proceedings and the pleadings on which the Board made its findings are summarized below.

A. The proceedings before the Board

This case came before the Board on charges and amended charges filed by the Union against the Company between September 1971 and June 1973 (J.A. 2-4). An amended complaint issued on the consolidated charges in July 1973 (J.A. 5-10). The Company filed an answer denying the commission of any unfair labor practices and asserting, as an affirmative defense, that the allegations of the complaint raise issues which "have either already been submitted to arbitration . . . or are otherwise resolvable through the voluntary contractual provisions of the parties' collective bargaining agreements . . ." (J.A. 12).

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[2] Members Fanning and Jenkins dissenting (J.A. 130-132).

On July 23, 1973, the Company filed a motion for summary judgment with a supporting affidavit and exhibits (J.A. 13-33). In support of its motion, the Company showed that the allegations of paragraph 8 of the complaint were "grievable and arbitrable under the parties' . . . collective bargaining agreements" (J.A. 17); that when the Union filed an unfair labor practice charge concerning these disputes, the Company invoked the contractual grievance and arbitration procedure (J.A. 17; 25-30); and that, after some initial resistance, the Union ultimately withdrew its objections to arbitration and the issues were heard before Arbitrator I. Robert Feinberg on May 24, 1973 (J.A. 17-18, 31-32).

The Company further asserted that the remaining allegations of the complaint concerned events occurring in 1971, involving two employees and their immediate supervisors; that no grievance had been filed over these disputes; and that the Company had proposed to the Union that they try to resolve the disputes either through their existing grievance and arbitration procedure or through a special dispute-solving mechanism to which they might mutually agree (J.A. 15). Accordingly, the Company requested that the Board grant the motion for summary judgment and dismiss the complaint in conformity with its decision in *United Aircraft Corporation,* 204 NLRB No. 133 (1973).

The Board's decision in *United Aircraft Corporation, supra,* issued on July 10, 1973, and is before this Court on the Union's petition to review in No. 74-1035. That case involves earlier unfair labor practice charges filed by this same Union against the same Company between December 1969 and February 1971. By a majority of three to two, the Board there found that the parties had resolved certain of the underlying disputes through their contractual grievance and arbitration procedure, in a manner consistent with the standards established in *Spielberg Manufacturing Co., supra,* 112 NLRB 1080, and that there

is a sufficient likelihood that the remaining disputes can be similarly resolved to justify a temporary withholding of Board processes pursuant to the policies expressed in *Collyer Insulated Wire, supra,* 192 NLRB 837. Three days after the Board issued its decision in *United Aircraft, supra,* Company Vice President Morse wrote Union Representative Ostro to suggest that, in light of the decision, the parties meet to resolve not only the disputes involved in that case but also those underlying the instant proceeding, which was then pending before the Board. With reference to all outstanding disputes in both cases, Vice President Morse stated (J.A. 33):

> As you know, some of the matters involved are quite old, others involve circumstances wherein no grievance has been filed, and still others are of such a character that their submission to the formal grievance procedure at this time may be impractical. It is my suggestion, therefore, that we meet with you – and whomever you wish to accompany you – to work out procedures for disposing of these disputes in the most expeditious manner possible, including the possibility of convening a special fourth step meeting by agreement of the parties without the need to process the matters through the lower steps of the grievance procedure. It would be my hope that through such discussions we could work out a procedure which would result in an early and amicable resolution of these disputes. Also, where such resolution is not accomplished – in spite of good faith efforts by both parties – to discuss the manner in which appropriate disputes may be promptly submitted to arbitration.

On July 24, 1973, Union Representative Ostro responded that the Union disagreed with the decision of the Board majority in *United Aircraft,* 204 NLRB No. 133; that it intended to petition for judicial review of the Board's order in that case; and that it considered the Company's request to meet in an attempt to work out procedures to

resolve the disputes involved in these cases as "at the least premature" (J.A. 72).

On August 3, 1973, the Board issued an order transferring the present proceeding to the Board and directing the parties to show cause why the Company's motion for summary judgment should not be granted (J.A. 34). On August 20, 1973, counsel for the General Counsel filed a response to the order to show cause, summarizing the specific facts that he would attempt to show in support of the allegations of the complaint if the case went to hearing (J.A. 35-46). Thereafter, the Union filed an opposition to the Company's motion for summary judgment (J.A. 47-62) and the Company filed a reply to the General Counsel's response to the order to show cause (J.A. 63-72).

On December 18, 1973, Arbitrator I. Robert Feinberg issued an opinion and award on the previously submitted disputes, underlying paragraph 8 of the complaint in this case, *supra*, p. 4 (J.A. 83-101). The arbitrator found no violation of the contract with respect to the allegation that the Company had refused to summon a steward for employee James A. Rizner (J.A. 95-101). That allegation formed the basis for subparagraph 8(a) of the complaint (J.A. 7). The arbitrator sustained the allegation that the Company, in violation of the contract, had refused to furnish certain information to the Union at the second step of a merit rating grievance filed by employee Kenneth R. Roberge (J.A. 84-95, 101). This same conduct was alleged as an unfair labor practice in subparagraph 8(b) of the complaint (J.A. 8). On January 18, 1974, the Company wrote the Union that it was prepared to reconvene the second step hearing in the grievance of Kenneth R. Roberge, in keeping with the arbitrator's decision that the Company's refusal to furnish the designated information at that step of the grievance procedure violated the agreement (J.A. 103).

On January 28, 1974, the Company filed a motion in this case requesting that the Board take official notice of the arbitrator's opinion and award and receive as new evidence the Company's letter to the Union offering to comply with the award (J.A. 73-103). The Union did not oppose this motion but filed a cross-motion requesting that the Board also receive as new evidence an affidavit of counsel and an excerpt from a transcript of contract negotiations that was part of the record before the arbitrator (J.A. 104-110).

In a supporting memorandum, the Union stated that it did not intend to press subparagraph 8(a) of the complaint although it did not concede that the arbitrator's rejection of the grievance over the alleged denial of a steward to employee Rizner was dispositive (J.A. 112, n. 1). The Union argued that the Board was required to sustain the complaint allegations of subparagraph 8(b), in light of the arbitrator's favorable disposition of the Roberge grievance, and that the Board should hold a hearing on the appropriate remedy and issue a remedial order for the violation alleged (J.A. 111-114). Finally, the Union urged that the Board should proceed to hearing on the remaining allegations of the complaint, which had not been submitted to arbitration under the contract (J.A. 112).

On September 3, 1974, the Board issued its decision in this case, finding that the arbitrator's award effectively disposed of the allegations of paragraph 8 of the complaint, in conformity with the standards established in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and that the remaining issues raised by the complaint should be deferred to the contract grievance and arbitration procedure pursuant to the policies expressed in *Collyer Insulated Wire*, 192 NLRB 837 (1971).

B. The alleged unfair labor practices

The Union continues to press unfair labor practice charges against the Company with respect to three employees. Thus, it is alleged that the Company (1) harassed, threatened, and discriminated against union steward Albert Weingarten; (2) erroneously attributed the forced retirement of employee John Smallridge to the insistence of the Union; and (3) refused to furnish the Union with information relevant to the grievance of employee Kenneth Roberge (J.A. 37-46, 8-9).[3] The facts urged to support these allegations are summarized below.

1. Employee Albert Weingarten

The General Counsel's response to the order to show cause included the following allegations in support of the contention that the Company harassed, threatened, and discriminated against union steward Albert Weingarten, in violation of Section 8(a)(3) and (1) of the Act (J. A. 41-43):

In June 1971, Albert Weingarten was appointed union steward (J. A. 41). Union stewards, unlike shop stewards, are not authorized to process grievances but they wear distinctive shirts and union badges, represent the interests of the employees, and solicit support for the Union (J.A. 36, n. 2). Weingarten enjoyed generally good relations with his supervisors before he became a steward (J.A. 41). When

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[3] As noted, the Union no longer presses the allegation that the Company unlawfully refused to summon a steward for employee James Rizner, following the arbitrator's denial of a grievance on this point (J.A. 112, n. 1, 95-101). Additional issues raised by the Union's charges against the Company (J.A. 3, 25-30) were withdrawn from arbitration after the General Counsel refused to include those allegations in the unfair labor practice complaint (J.A. 83-84).

Weingarten complained about overtime assignments shortly before his appointment, General Foreman Downing responded in a conciliatory manner *(ibid.)*.

After Weingarten became a steward, he began to wear a union shirt and badge (J.A. 41). One week later, Weingarten complained to Downing about the operation of forklifts by non-department employees who were allegedly not authorized to operate them, characterizing this practice as a safety hazard *(ibid.)*. Downing answered that it was none of Weingarten's business, called Weingarten a troublemaker, and said he would assign these men to the work despite the Union's objections (J. A. 41-42). On July 7, 1971, Weingarten told Downing he wanted to file a grievance over the issue and asked that a shop steward be called (J.A. 42). Downing first said that Weingarten did not need "a goddamn steward," then said he would think it over, and finally discussed the matter with the shop steward *(ibid.)*.

Shortly after his meeting with the shop steward, Downing berated Weingarten for wearing a union shirt and badge, shouted that Weingarten was in a department where he was not wanted, accused Weingarten of disrupting work and badgering, and told Weingarten that he could walk him out of the department whenever he chose (J.A. 42). Downing called the Union people names and said that he would do whatever he wanted in the department and that "the goddamed Union couldn't do anything about it" *(ibid.)*. After stating that he "knew about the Union" – "they had all been a bunch of gangsters," who carried guns – Downing told Weingarten that "where he come from they took care of people like this" (J.A. 42-43). Finally, Downing asserted that Weingarten and the shop steward had planned this entire incident as part of a conspiracy against him (J.A. 43).

Thereafter, Downing ordered Weingarten not to follow the accepted practice of stopping work 5 or 10 minutes early to clean up and continually asked Weingarten if he was quitting early (J.A. 43). Foreman Owens kept Weingarten under surveillance, following him whenever he went to the restroom *(ibid.)*.[4]

2. Employee John Smallridge

The General Counsel's response to the order to show cause included the following allegations in support of the contention that the Company erroneously attributed the forced retirement of employee John Smallridge to pressure from the Union, in violation of Section 8(a)(1) (J.A. 43-45):

The collective bargaining agreement provided that the Company, at its discretion, could retire employees after they reached age 65 (J.A. 44). Union member John Smallridge became eligible for retirement, at age 65, in June 1968 *(ibid.)*. At the Company's request, Smallridge accepted three one-year extensions of his retirement, the last of which was to expire on June 30, 1971 (J.A. 44). In April 1971, Smallridge's supervisors, General Foreman Peter Laskavin and Foreman Peter Valenti, told him that many men were being laid off and that he would have to retire on April 18, 1971, approximately 10 weeks ahead of schedule

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[4] No grievance was filed over any of these incidents. Relevant provisions of the collective bargaining agreement then in effect are reproduced in the Appendix in No. 74-1035 (pp. 607-628, GCX 47). They provided that employees covered by the agreement "may not be discriminated against . . . because they engage in activities protected by the NLRA" and "have the right to become or remain members of the union . . . without being subject to restraint or coercion . . . because of their exercise of this right" (Art. IV, pp. 608-609). Grievances under these provisions are subject to binding arbitration on mutual agreement of the Company and the Union (Art. VII, Sec. 3(b) and (d), pp. 611-612).

(ibid.). Laskavin said he had done everything he could to retain Smallridge but that the Union was forcing his retirement *(ibid.).* According to Laskavin, Plant Service Supervisor John LeBlanc had spent the entire afternoon attempting to persuade the Union to permit Smallridge to remain until June 30, without success *(ibid.).*

Smallridge immediately confronted Union Representative Bill Nellis to complain about the Union's actions in forcing him to retire early (J.A. 45). Nellis denied any union responsibility for Smallridge's termination *(ibid.).* The next day, when Smallridge accused Valenti and Laskavin of improperly blaming the Union for his retirement, they denied attributing Smallridge's termination to the Union, stating that the Company had made the decision as part of a general layoff *(ibid.).*

Thereafter, on April 14, 1971, Henry Czarnecki, another foreman on a different shift in the same department, told union steward James Kenyon and two employees that Smallridge was being retired since he had two extensions already and, "the Union . . . said that anyone who was on extension had to be retired" (J.A. 45). Czarnecki added that, "there was nothing the foreman or the general foreman could do about it" *(ibid.).*[5]

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[5] The Union never filed a grievance over any of the foregoing events. Relevant provisions of the collective bargaining agreement then in effect are reproduced in the Appendix in No. 74-1035 (pp. 509-510, GCX 6). The "Purpose" clause provided (p. 509):

> It is the intent and purpose of the parties hereto that this agreement promote and improve the industrial and economic status of the parties, provide orderly collective bargaining relations between the company and the union, and secure a prompt and fair disposition of grievances so as to eliminate interruptions of work and interference with the efficient operation of the company's business.

Under the "Recognition" clause, the Company recognized the Union "as the sole and exclusive collective bargaining agency for the [unit] employees . . . for the purposes set

(continued)

3. Employee Kenneth Roberge

The General Counsel's response to the order to show cause set forth the following allegations in support of the contention that the Company refused to furnish the Union with information concerning the grievance of employee Kenneth Roberge, in violation of Section 8(a)(5) and (1) of the Act (J.A. 38-40):

On June 16, 1972, employee Roberge filed a grievance contending that his merit rating did not accurately reflect his job performance. At a Step 1 grievance meeting, the shop steward requested that Foreman Pitney produce the relevant entries in a notebook he maintained to substantiate the merit rating he had given Roberge. This request was denied. When the Union renewed its request at a Step 2 grievance meeting, Plant Manager Phelps answered that he knew nothing of the notebook. The Union's request for relevant and necessary information at the second step of the grievance procedure was in accordance with the information provisions of the collective bargaining agreement. It was the Company's denial of information at this stage that was alleged to violate Section 8(a)(5) and (1).

The arbitrator's opinion and award included the following findings with respect to the Roberge grievance (J.A. 84-95):

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[5] (continued) forth in the National Labor Relations Act, as amended" (Art. III, p. 510). The "Non-Discrimination" clause proscribed discrimination against unit employees because they engaged in activities protected by the Act and guaranteed employees the right to become or remain union members "without being subject to restraint or coercion . . . because of their exercise of this right" (Art. IV, p. 510). Grievances under these provisions are subject to binding arbitration on mutual agreement of the Company and the Union (Art. VII, Sec. 3(b) and (d), p. 513).

At the Step 1 grievance meeting, Foreman Pitney explained Roberge's lower merit rating by stating that Roberge had put on his hat and coat before the termination of work several times and had told Pitney he would rather go on unemployment compensation than work for the Company (J.A. 85-86). It appeared at the arbitration hearing that Foreman Pitney voluntarily maintained three notebooks on various aspects of employee performance, which included notations about warnings to Roberge for poor use of working time and absences from work areas and a rating of Roberge's production time on jobs as compared with an estimate of the time which would normally be required (J.A. 86). The shop steward asked Foreman Pitney for the notebooks at the Step 1 grievance meeting, but Pitney denied any knowledge thereof *(ibid.)*.

Witnesses at the arbitration hearing gave various accounts of the Step 2 meeting. Manager Phelps testified that he asked what information the Union had to substantiate the claim that Roberge had been incorrectly evaluated and that he denied the shop steward's request for the foreman's notebook because he did not consider it a document that the Company was required to produce under the contract (J.A. 86). Shop steward Kelly testified that he told Manager Phelps he had not received any information from the foreman at Step 1 and that he felt it was the Company's obligation to tell the Union why Roberge was downgraded (J.A. 86-87). According to Kelly, Manager Phelps referred to three "small allegations," without saying when the events were supposed to have occurred (J.A. 87). Kelly further testified that when Phelps stated there was nothing to substantiate the grievance, he told him that "the substantiation for our grievance was in [Foreman] Pitney's notebooks" and asked Phelps to produce them, to which Phelps replied, "he had no knowledge of any notebooks" *(ibid.)*.

The collective bargaining agreement, effective December 1, 1971, provided that at Step 2 of the grievance procedure:

> The Company will produce such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance at this step of the grievance procedure. There shall be no obligation on the part of the company to produce any of the above records except the specific record or records which would prove or disprove a specific factual contention of the aggrieved employee [J.A. 87; 21, Art. VII, Sec. 1, Step 2].[6]

Prior to the agreement of December 1, 1971, only the first sentence of the language quoted above was contained in the agreement (J.A. 78). The second sentence was proposed by the Company in the 1971 negotiations and was ultimately accepted by the Union *(ibid.)*. According to the testimony at the arbitration hearing, the Company proposed the language because of the "continuing controversy between the Union and the Company over the scope of documents to be produced at Step 2 merit rating grievances" (J.A. 87-88).

Excerpts from the transcript of the negotiations reveal that the Company complained that the Union was using the provision as a basis for "a fishing expedition" (J.A. 88; 109-110) and that the Company believed that its proposed additional language was necessary to "prevent unnecessary haggling and demands . . . for numerous records" (J.A. 88). The transcript also shows that when the Union objected to the proposal on the ground it would permit the Company "to withhold information

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[6] A grievance that the Company had failed to produce records in compliance with these provisions was subject to mandatory and binding arbitration upon the request of either party (J.A. 22; Art. VII, Sec. 3(a) 22).

that might to some degree help to settle the grievance and you'll determine what's factual and what isn't factual and what will prove or disprove without giving a full disclosure and full facts on what it takes to settle a grievance," the Company replied that, "That isn't what it says at all" *(ibid.)*.

On the foregoing evidence, the arbitrator concluded that the foreman's notebooks were "production records" that "would prove or disprove a specific factual contention of the aggrieved employee" within the meaning of the contract (J.A. 88-94). Accordingly, he held that "the Company violated the agreement by refusing to produce, in the second step of the grievance procedure relating to the grievance filed on behalf of Kenneth R. Roberge, the notebooks maintained by Foreman Edwin Pitney" (J.A. 95, 101).

C. The contractual grievance and arbitration procedure

The grievance and arbitration procedure in the collective bargaining agreement, which became effective for Pratt & Whitney on December 1, 1971, is reproduced at J.A. 20-24.[7] It begins with a commitment that –

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[7] Earlier versions of the contractual procedure are reproduced in the Appendix in No. 74-1035 (pp. 511-523, 609-621). Although certain changes were made in the contract language effective December 1, 1971, the provisions discussed in the text above are unchanged from the earlier agreements. See Board brief in No. 74-1035 (p. 17). The collective bargaining agreements with Lodges 700, 743 and 1746, at the three plants here involved, have identical grievance and arbitration provisions (J.A. 127).

> In the event . . . a difference arises between the company, the union or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which must be followed [J.A. 20, Art. VII, Sec. 1].

A comprehensive four-step grievance procedure follows, culminating in arbitration (J.A. 20-23, Art. VII, Sec. 1, Steps 1-4, Sec. 3). The contract lists 39 types of grievances, which if not settled at Step 4, "shall be submitted to arbitration upon the request of either party" (J.A. 21-23, Art. VII, Sec. 3(a)). All other grievances arising under the contract, if not settled at Step 4, may be referred to arbitration upon the written agreement of the Company and the Union (J.A. 23, Art. VII, Sec. 3(b)). The grievance and arbitration procedures are available to employees, the Union, and the Company (J.A. 20-23, Art. VII, Secs. 1-3), and the arbitrator's decision is to be "final and conclusive and binding" (J.A. 23, Art. VII, Sec. 3(d)).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Fanning and Jenkins dissenting) granted the Company's motion for summary judgment and dismissed the complaint in conformity with its earlier decision in *United Aircraft Corporation*, 204 NLRB No. 133 (1973), petition to review pending (C.A. 2, No. 74-1035). It found that "the Arbitrator's Opinion and Award satisfied the standards set forth in *Spielberg Manufacturing Company, supra* [112 NLRB 1080], and effectively disposes of the allegations of paragraph 8 of the complaint" (J.A. 127). The Board noted that the Company "has taken affirmative action to comply with the arbitrator's award and has submitted an affidavit expressing its willingness to reconvene the second step grievance hearing" of employee Kenneth Roberge and

to produce the notebooks maintained by his foreman (J.A. 126). In the Board's view, these events demonstrate not only that the Company is willing "to honor its contractual commitments dealing with procedures for dispute resolution," but also that "the parties' agreed-upon grievance and arbitration machinery can reasonably be relied upon to function properly and to resolve the current disputes fairly" (J.A. 126).

The remaining allegations of the complaint, the Board found, "are essentially limited to isolated acts" involving two employees and their immediate supervisors at two separate plants in 1971 (J.A. 127). The Board noted that the parties involved in the earlier *United Aircraft* case "and those involved herein are the same, and that the nature of the allegations contained in the instant complaint are also the same" *(ibid.)*. In light of its decision to defer to the contract grievance and arbitration machinery in *United Aircraft, supra*, the Board found that, "the only issue before us is whether the allegations of the instant complaint are subject to voluntary adjustment through the parties' grievance and arbitration provisions" *(ibid.)*. The Board concluded that the remaining disputes are amenable to such adjustment and saw "no apparent reason why . . . [they] ought not to be resolved through the parties' agreed-upon grievance and arbitration procedures" (J.A. 127-128), pursuant to the policies expressed in *Collyer Insulated Wire, supra*, 192 NLRB 837, and approved in *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16-17 (1974). Accordingly, the Board ordered the complaint dismissed but retained jurisdiction for the purpose of entertaining an appropriate motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness, been amicably settled in the grievance procedure or submitted to arbitration or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act (J.A. 128-129).

ARGUMENT

I. THE BOARD PROPERLY DEFERRED UNRESOLVED ISSUES TO THE CONTRACT GRIEVANCE AND ARBITRATION PROCEDURE

The Board's decision in this case follows its earlier decision in *United Aircraft Corporation*, 204 NLRB No. 133 (1973), which is pending before the Court on the Union's petition to review in No. 74-1035. In its prior decision, the Board found that, despite a history of unfair labor practice litigation between these parties, there was a sufficient likelihood that the current disputes could be fairly resolved through the contract grievance and arbitration procedure to justify a temporary withholding of Board processes pursuant to the policies expressed in *Collyer Insulated Wire, supra*.

The Board relied on two factors in concluding, in No. 74-1035, that there is now effective dispute-solving machinery available and that the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile. First, it found that the violations alleged did not reflect a pattern of continuing anti-union conduct orchestrated by the Company but, rather, suggested the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors in plants as large as these. Second, the Board found that while the litigious characteristics exhibited in the past by both parties cannot but create some doubt about this matter, there is positive evidence of maturation of the collective bargaining relationship in the successful resolution of two out of the three disputed suspensions involved in that case through the contract grievance and arbitration procedure.

Similar considerations justify the Board's temporary withholding of its processes here to provide an opportunity for the parties to resolve the outstanding disputes in this case through their contractual machinery. As the Board noted, the unresolved disputes here are essentially limited to isolated acts in 1971 involving two employees (Weingarten and Smallridge) at two separate plants (Windsor Locks and Middletown).[8] Moreover, disputes involving two other employees (Rizner and Roberge) at a third plant have been successfully resolved through the contract procedure. The Union no longer presses the Rizner dispute, which resulted in an arbitral award unfavorable to the Union, and the Company has offered to comply fully with the arbitrator's award in the Roberge dispute, which was resolved in the Union's favor. There is thus a sound basis for the Board's conclusion that the parties' agreed-upon grievance and arbitration machinery can reasonably be relied upon to function properly and to resolve the current disputes fairly (J.A. 126).

In sum, deferral here follows from the deferral in No. 74-1035.[9] The nature of the outstanding disputes in this case is similar to that of certain of the disputes deferred and still awaiting resolution through the contract procedure in the earlier case. Conversely, the disputes resolved through the grievance and arbitration machinery here are similar

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[8] In its earlier decision, the Board noted that the Windsor Locks plant had over 4,700 employees and 136 supervisors and that the Middletown plant had 3,500 employees and 235 supervisors. The East Hartford plant, where the already-arbitrated disputes concerning employees Roberge and Rizner arose, had nearly 24,000 workers and 1,274 supervisors. See the Appendix in No. 74-1035 (p. 844).

[9] It was in the context of its finding that the same considerations that warranted deferral in No. 74-1035 also justified deferral here that the Board stated: "Therefore, the only issue before us is whether the allegations of the instant complaint are subject to voluntary adjustment through the parties' grievance and arbitration provisions" (*supra*, p. 17). By quoting this statement out of context, the Union (Br. 19) implies that the Board did not balance the considerations for and against deferral. But the Board in No. 74-1035 discussed at some length its reasons for concluding that the factors militating in favor of deferral outweighed those militating against and its rationale there was incorporated and applied here.

to issues deferred in No. 74-1035.[10] The success of the contract procedure in resolving such disputes thus provides further support for the decision to defer in both these cases. We show below that the Union's attacks on the Board's deferral in the present case are without merit.

A. Resort to the contract procedure is not unpromising or futile

The Union asserts that, "the record in this case further demonstrates the absurdity of the Board's assumption that [United] Aircraft has 'matured' " (Br. 15). In fact, what the Board found was that although the litigious characteristics exhibited in the past by both parties cast some doubt on their capacity for dispute settlement, the successful resolution of certain of their disputes through the contractual procedure provides "positive evidence of maturation of the collective bargaining relationship" (*supra*, p. 18). Contrary to the Union's suggestion, the Board's finding did not imply that relations between the parties had advanced to the point where they would never again have any disputes under the Act or the contract. Rather, the Board assumed that in organized plants of this size there would be some conflicts between management personnel and union representatives or adherents, which might give rise to unfair labor practice charges or contract grievances.

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[10] For example, an issue before the Board in the earlier case was whether the Company's failure to furnish the Union with foremen's notebooks in connection with merit rating grievances violated Section 8(a)(5) and (1) of the Act. The Administrative Law judge found no violation at Step 1 of the grievance procedure, on the theory that the collective bargaining agreement had waived the Union's right to the production of records at Step 1 (Appendix in No. 74-1035, p. 814). However, he found a violation in the failure to produce foremen's notebooks at Step 2 (*ibid.*). The Board held that both these issues should be resolved through the contract procedures in the first instance. In the present case, the failure to produce the foreman's notebooks was alleged to constitute a violation of the Act only at Step. 2. The arbitrator, in finding a violation of the contract in the refusal to produce the notebooks at Step 2, effectively resolved the issue of the Union's right to these materials.

The question was whether there was a sufficient likelihood that those disputes could be fairly and effectively resolved through the contract procedure to justify a temporary withholding of Board processes here and in No. 74-1035.

In attacking the Board's affirmative answer to this question, the Union attempts to show that the alleged violations in this case reveal a continuing campaign by the Company to undermine the Union and subvert the collective bargaining relationship. For example, the Union asserts that "Supervisor Downing's anti-union diatribe and his surveillance and harassment of union steward Weingarten . . . conform to United's previously established 'general pattern' of anti-union activity" (Br. 16). But the allegations of the complaint, rather than indicating a planned effort to sabotage the Union, suggest an individual dispute in which Downing took personally Weingarten's criticism of his work assignments, lost his temper, and accused Weingarten of badgering and being involved in a "conspiracy" against him (*supra*, p. 9). The alleged instances of supervisory surveillance and discrimination consisted of preventing Weingarten from quitting work 5 or 10 minutes early to clean up and following him to the restroom. Without implying that such alleged misconduct is "normal and wholesome" (Un. Br. ~~18~~ 16), the Board could reasonably conclude that incidents of this sort are handled more effectively through contract grievance and arbitration procedures shortly after they occur rather than through the more time-consuming statutory procedures, which in the present case have thus far consumed approximately 3½ years.

The Union further asserts that the Company gave "widespread circulation" to the false report that the Union was responsible for employee Smallridge's forced retirement, with the "purpose" of disparaging the Union in the eyes of the employees (Br. 16, 19). However, the

General Counsel's response to the order to show cause alleges only two instances in which supervisors made such statements – first, to employee Smallridge and then to a union steward and two other employees (*supra*, pp. 10-11). The response further alleges that Supervisors Laskavin and Valenti repudiated the story to Smallridge the day after they told it to him. At the most, the story charged the Union with insisting that since many employees were being laid-off, the Company should retire an employee, who was on the third extension of his retirement, in April rather than June. If the Company had wanted to discredit the Union in the eyes of the current employees, it could surely have devised a story better calculated to serve that purpose. In short, the Board could reasonably view this dispute as an additional allegation of individual misconduct, appropriate for resolution through the contract procedure, rather than as evidence of a grand design on the part of the Company to repudiate the Union as bargaining agent.

Finally, the Union urges that the "facts found by the arbitrator, the Company's arguments to him, and his conclusion that the Company had wrongfully withheld information," in connection with employee Roberge's merit rating grievance, establish that the Company "engaged in strenuous efforts to undermine the operation of the grievance procedure" (Br. 17). Contrary to the Union's suggestion, legitimate differences may arise between an employer and a union about what materials are relevant and necessary in the processing of employee grievances, without any disposition on either side to sabotage the grievance machinery. As the arbitrator found, the Company complained in contract negotiations that the Union was using the provision for the production of records at Step 2 as the basis for "a fishing expedition" and believed that additional language was necessary to "prevent unnecessary haggling and demands

. . . for numerous records" (*supra*, p. 14).[11] The Company contended that foremen's notebooks were not company "production records," which it was required to produce at Step 2, since the notebooks are merely a collection of loose, informal notes voluntarily maintained by individual foremen for their own use (J.A. 88-89, 91).[12] Although the arbitrator ultimately rejected the Company's position and upheld the Union's right to the foreman's notebooks at Step 2, his decision scarcely establishes a company intent "to render the Unions' resort to the grievance machinery 'futile' " (Un. Br. 18).[13]

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11 As noted *supra*, p. 14, prior to 1971, the contract provided that –

> The company will produce such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance . . . [at Step 2] of the grievance procedure.

In 1971, as a result of the Company's expressed concern about the Union's use of this provision for fishing expeditions, the following sentence was added:

> There shall be no obligation of the part of the company to produce any of the above records except the specific record or records which would prove or disprove a specific factual contention of the aggrieved employee.

12 In addition, the Company maintained that the Union had raised no "specific factual contention," which could be proved or disproved by the foreman's notebooks, and that the notebooks would be unintelligible without explanation by the foreman, who was not a contractually designated participant at Step 2 (J.A. 88-89).

13 In a further attempt to attribute malevolence to the Company, the Union charges it with condoning "its foreman's false denial at Step 1 of the grievance procedure that he had any notebooks bearing on merit ratings" (Br. 17). The apparent basis for this assertion is the allegation that Plant Manager Phelps stated at the Step 2 meeting that "he had no knowledge of any notebooks," in response to shop steward Kelly's claim that the substantiation for the merit rating grievance was in Foreman Pitney's notebooks (*supra*, p. 13). But lack of knowledge by the plant manager of one supervisor's notebooks was perfectly consistent with the Company's view that foremen who maintained notebooks did so voluntarily for their own purposes and that any such notebooks were not company records producible under the contract. There were more than 1,200 supervisors at the plant (*supra*, p.19, n. 8); some kept notebooks, others did not (J.A. 89).

Nor does the record support the Union's assertion that the "primary objective" of the Company in withholding the information was to delay the processing of the underlying grievance and "to frustrate the Union's functioning as a collective bargaining representative" (Br. 34). On the contrary, the Company promptly invoked the contract grievance and arbitration procedure to resolve the issue of the Union's right to the information, pressed the grievances to arbitration, and offered to comply with the arbitrator's award by reconvening the grievance proceeding at Step 2 and furnishing the foreman's notebooks. Far from showing the futility of resort to the contract procedure, this course of conduct demonstrates that the Company is willing "to honor its contractual commitments dealing with procedures for dispute resolution" and that the parties' grievance and arbitration machinery "can reasonably be relied on to function properly and to resolve the current disputes fairly" (J.A. 126).[14]

B. The deferred issues are amenable to resolution through the contract grievance and arbitration procedure

As the Union points out (Br. 20-23), the issues which the Board here deferred to the grievance and arbitration procedure are not covered

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[14] The Union repeats here its contention in No. 74-1035 that the reason for the Company's willingness to resolve disputes through the contract procedure is that it prefers the arbitral forum to proceedings before the Board (Br. 19). According to the Union, this preference is attributable to the ineffectuality of the remedies provided through arbitration *(ibid.)*. We show *infra*, pp. 32-36, that arbitral remedies are effective. As suggested in our brief in No. 74-1035, pp. 24-25, the inquiry whether contract procedures offer a sufficient promise of resolving disputes fairly and effectively to justify a temporary withholding of Board processes is not advanced by speculation about the motives of the parties for preferring one forum or the other.

by the provisions of the contract authorizing arbitration upon the request of either party. Rather, they are subject to the mandatory four-step grievance procedure and, if not settled there, they may be referred to arbitration, pursuant to the arbitral procedure established in the contract, upon mutual agreement of the parties (J.A. 23, Art. VII, Sec. 3(b)).[15]

The Union concedes that the alleged unfair labor practices are arguably violations of the contract, as well (Br. 20). It contends, however, that since the disputes are not subject to mandatory arbitration under the contract, the Board's deferral order is contrary to the policies of the Act because it seeks to compel an arbitration to which the parties have not agreed. A similar contention was rejected in *Nabisco, Inc. v. N.L.R.B.*, 479 F.2d 770 (C.A. 2, 1973). There, the contract procedure called for the submission of unsettled grievances to a committee composed of an equal number of union and management representatives.

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[15] In No. 74-1035, most of the issues deferred are subject to arbitration at the request of either party but some require mutual agreement for arbitration. The Board noted in that case: "As to virtually all of the matters involved . . . there appears to be no question but that they are covered by the provisions of the contracts providing for arbitration upon the request of either party if the dispute is not settled under the grievance procedures. . . ." It added, "To the extent that there may be some question as to the arbitrability of some items, that issue is, of course, for the arbitrator. . . ." See Appendix in No. 74-1035 (p. 846, n. 5). The Board in the present case referred to its earlier statement in No. 74-1035 (J.A. 127, n. 4), but erred by stating that the disputes deferred here are "covered by the provisions of the contracts providing for arbitration on the request of either party if the dispute is not settled under the grievance procedures" (J.A. 127). As noted in the text above, the disputes deferred in this case are covered by the contract provision authorizing arbitration upon agreement of the parties. Only the Riener and Roberge disputes, which went to arbitration, are arbitrable on the request of either party. The Union did not seek to call the Board's error to its attention by way of motion for reconsideration or otherwise. It raised the issue for the first time in its brief to the Court. Cf. *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, __U.S. __ n. 3 (1975), 88 LRRM 2698, 2700, n. 5, decided Feb. 19, 1975 (No. 73-765).

479 F.2d at 772. If the committee was unable to reach a majority decision on how the grievance should be resolved, the grievance could then be referred to arbitration, but only upon a majority vote of the committee. This Court rejected the employer's contention that "the Board should defer only when the dispute settlement technique adopted by the parties involves mandatory arbitration," for it declined to "read the policy underlying the Act, as expressed in the legislative history, so narrowly." 479 F.2d at 773.

The Board's deferral to the contract grievance and arbitration procedure in the present case is similarly consistent with the statutory policies. Thus, the parties have agreed to make an "earnest effort" to resolve their differences concerning contract "interpretation, application, or compliance" through the grievance procedure "which must be followed" (*supra*, p. 16). That procedure calls for efforts to settle differences through grievance meetings at four steps, establishes binding arbitration as the final step in the process if settlement efforts are unsuccessful, and provides that those grievances which are not subject to mandatory arbitration upon the request of either party, may be referred to the arbitral process upon mutual agreement of the Company and the Union, *supra*, p. 16.

Following the Board's decision in No. 74-1035, the Company wrote the Union offering to discuss the most expeditious way for settling the outstanding disputes in that case and this through the grievance procedure and, where settlement efforts were unsuccessful, to discuss the manner in which appropriate disputes might be promptly submitted to arbitration. Contrary to the Union's suggestion, the Board does not require, as a precondition to deferral, that both parties be contractually *obligated* to arbitrate a particular dispute. See *Western Electric, Inc.*, 199 NLRB 326, n. 3, 328 (1972), approved *sub nom. Local No.*

2188, I.B.E.W. v. N.L.R.B., 494 F.2d 1087 (C.A.D.C., 1974), cert. denied, __U.S. __, 95 S.Ct. 61.[16] It is sufficient if an agreed-upon contract procedure for binding arbitration is *available* to the charging party. The Company's offer to agree to arbitrate here made binding arbitration available to the Union under the contract. If that apparent availability should prove illusory because the Company reneges on its offer or otherwise blocks arbitration, the Board has retained jurisdiction to provide the Union with a remedy. See *Medical Manors d/b/a Community Convalescent Hospital*, 206 NLRB No. 124 (1973), 84 LRRM 1421, 1422 (where an employer resisted arbitration after the Board had deferred in reliance upon the employer's assertion that it was prepared to proceed to arbitration, the Board reasserted jurisdiction). *Gary-Hobart Water Corp.*, 210 NLRB No. 87 (1974), 86 LRRM 1210, 1211, enfd., __F.2d __ (C.A. 7, No. 74-1483), 88 LRRM 2830, 2831, 2833, decided, Feb. 21, 1975.

In these circumstances, the Board properly concluded here, as it did in *Nabisco*, that "federal labor policy would be furthered by giving the grievance procedure a chance to work, while retaining jurisdiction to step in if it did not." 479 F.2d at 773. This result is particularly appropriate here and in No. 74-1035, where the outstanding disputes between the parties are 3 to 5 years old, many of the disputes in No. 74-1035 are subject to arbitration upon the request of either party, and the Union never suggested to Board that any distinction should be made between those disputes that are subject to arbitration on the request of either party and those that are arbitrable on mutual agreement of the parties. See J.A. 47-62, 104-120, and *supra*, p. 25, n. 15.

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16 In its brief to this Court, the Union states (p. 21, n. 12): "The Company's self-serving offers *to agree* to arbitrate statutory violations which the parties were *not* contractually bound to arbitrate, the Union, of course, declined (J.A. 31, 71)."

II. THE BOARD PROPERLY DEFERRED TO THE ARBITRATOR'S OPINION AND AWARD

In *Spielberg Mfg. Co., supra*, the Board announced a policy of deferring to outstanding arbitration awards, provided that, "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." (112 NLRB at 1082). The Board, in subsequent decisions emphasized that its policy is to honor an arbitral award which satisfies the *Spielberg* criteria, regardless of whether it would have made a similar award, or granted similar relief had the matter been before it *de novo*. *Howard Electric Co.*, 166 NLRB 338, n. 1, 341 (1967); *Terminal Transport Co.*, 185 NLRB 672, 673 (1970). This policy has received wide judicial approval. See, *e.g.*, *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271 (1963); *Associated Press v. N.L.R.B.*, 492 F.2d 662, 667 and cases cited at n. 21 (C.A.D.C., 1974); *Local Union No. 715, I.B.E.W. v. N.L.R.B. (Malrite)*, 494 F.2d 1136, 1137-1138 (C.A.D.C., 1974).

As noted *supra*, p. 28, the Board applied its *Spielberg* policy here in concluding that the arbitrator's award effectively disposed of the allegations of paragraph 8 of the complaint. The award declares that the Company violated the agreement by refusing to furnish the foreman's notebooks in the second step of employee Roberge's merit rating grievance (J.A. 101). Since the award was in its favor, the Union, of course, does not challenge the arbitrator's decision. However, it contends that, under *Spielberg*, the Board should defer only to the arbitrator's findings of fact and his conclusions of law on the contract claim. Thus, in the Union's view, deferral does not relieve the Board of the necessity for making an unfair labor practice finding on the same facts and issuing a remedial order for the statutory violation. However, as

shown *supra*, the Board's *Spielberg* policy contemplates deferral to the arbitral award as a complete settlement of the dispute unless the proceedings were unfair or the result reached is repugnant to the Act. Thus, the Union may challenge the award as repugnant to the Act because of the alleged inadequacy of the remedy. But the Board will not assert jurisdiction merely because it would have ordered different relief had the matter been before it *de novo*.

Contrary to the Union's contention (Br. 26-27), the Supreme Court's decision in *Carey v. Westinghouse*, *supra*, is not inconsistent with this articulation of the Board's deferral policy. Although the Court in *Carey* recognized the Board's undoubted authority to adjudicate alleged unfair labor practices despite concurrent proceedings to enforce the contract through the arbitral process under Section 301, it approved the Board's deferral policy and specifically noted that, "the Board shows deference to the arbitral award, provided the procedure was a fair one and the results were not repugnant to the Act" (375 U.S. at 270-271, footnotes omitted).[17]

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[17] The Union's citation (Br. 27-28) of *Schott's Bakery, Inc.*, 164 NLRB 332 (1967), is similarly inapposite. There, an employee was first transferred to a new job and then discharged. The legality of the transfer, but not the discharge, was brought before an arbitrator, who determined that the transfer was discriminatory and conditioned his reinstatement award on a subsequent determination that the discharge was also unlawful. When the legality of both the transfer and the discharge came before the Board on unfair labor practice charges, the Board could not dismiss the complaint, in deference to the arbitral award, because the arbitrator had not considered the legality of the discharge and had made reinstatement for the transfer conditional on a subsequent determination of illegality respecting the discharge. Accordingly, the Board considered the case on the merits, found that both the discharge and the transfer were unlawfully motivated, and ordered reinstatement with backpay. 164 NLRB 332, 338.

As the Union notes (Br. 29-30), the position that it urges here was expressly rejected in *Local Union No. 715, I.B.E.W. v. N.L.R.B., supra*, 494 F.2d at 1137-1138. The court there held that, "In the absence of procedural irregularity or statutory repugnancy, . . . the Board is free to adopt the arbitral award as a complete remedy for unfair labor practices related to the contract dispute, even though the Board has exclusive authority to adjudicate unfair labor practice charges." See also, *Associated Press v. N.L.R.B., supra*, 492 F.2d at 667 ("We think it clear that submission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would give *de novo* consideration to the issue which the arbitrator might resolve"). Cf. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes would be undermined if courts had the final say on the merits of the awards").

The Union seeks to avoid the force of these authorities on the ground that "deferral is appropriate only with respect to matters which the arbitrator actually decided" (Br. 31, 24-25, citing *Local Union 715, I.B.E.W. v. N.L.R.B. (Malrite), supra*, 494 F.2d at 1139-1140 and *Banyard v. N.L.R.B.*, 505 F.2d 342, 348 (C.A.D.C., 1974)). This requirement is lacking here, the Union argues, for two reasons. First, according to the Union, the arbitrator's opinion establishes independent violations of Section 8(a)(5) and (1) of the Act other than the Company's refusal to furnish the foreman's notebooks (Br. 24).[18] Had the case

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[18] The additional violations alleged by the Union (Br. 23) are that the Company (1) "falsely denied the existence of the relevant information" (see *supra*, p. 23

(continued)

gone to hearing, the Union contends, the General Counsel could have amended the complaint to add allegations that this conduct also violated the Act (Br. 24). Therefore, since the arbitral award is not addressed to this other conduct, the Union says, the arbitrator failed to decide some of the issues before the Board on this aspect of the case.

The short answer is that the complaint, as written, defines the issues before the Board. Sections 3(d) and 10(b) and (c) of the Act. If counsel for the General Counsel had thought it appropriate to allege as unfair labor practices additional conduct brought out at the arbitration hearing, he could have filed a motion with the Board to so amend the complaint at any time from December 18, 1973, when the arbitrator's opinion and award issued, until September 3, 1974, when the Board's decision and order issued. N.L.R.B. Rules and Regulations, Series 8, as amended, Sec. 102.17 (29 C.F.R. § 102.17). Absent such an amendment, the Board properly treated the allegations of the complaint as the only issues before it and deferred to the arbitrator's award as dispositive of the allegations of paragraph 8. *National Maritime Union v. N.L.R.B.*, 423 F.2d 625, 626-627 (C.A. 2, 1970).

The Union's second ground for arguing that the issues before the Board were different from the issues before the arbitrator is simply a repetition of its initial argument that *Spielberg* requires the Board to issue its own unfair labor practice order and not merely to defer to the arbitrator's award. Thus, the Union says that since "the arbitrator did

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18 (continued) n. 13); (2) "sought to extract a waiver of the union's right to receive the relevant information" (*i.e.*, the Company bargained for and secured the contract amendment discussed *supra*, p. 23 n. 11); and (3) "misrepresented those negotiations to the arbitrator" (*i.e.*, the arbitrator found that the Company's interpretation of the contract amendment "would seem to be in conflict with the apparent assurance during the negotiations to the effect that relevant information that might help to settle the grievance would not be withheld" (J.A. 94).

not decide whether the withholding of information is 'an unfair labor practice or what remedy . . . is required by the policies of the National Labor Relations Act," the Board could not defer to his award on the remedial issue (Br. 31). But the authorities cited by the Union make clear that the required congruence of issues before the Board and the arbitrator is limited to substantive issues and does not extend to the question of appropriate remedial relief. Thus, in both *Local Union 715, I.B.E.W. v. N.L.R.B. (Malrite), supra*, 494 F.2d at 1138, and *Banyard v. N.L.R.B., supra*, 505 F.2d at 348, the court recognized that where the substantive issues before the arbitrator and the Board are congruent and deferral is otherwise appropriate, "the arbitration award becomes the remedy for both contractual and statutory violations."

It follows from what has been said that to prevail here the Union must show that the alleged inadequacies of the award make it repugnant to the Act. No such repugnancy is shown here. Although the award is limited to the denial of one foreman's notebooks in connection with an individual employee's grievance, it establishes a construction of the contracts that makes foremen's notebooks generally producible records at Step 2 of the grievance procedure and limits employer defenses to the production of information at this step (*supra*, p. 23 n. 12). Thus, the award would normally be dispositive of the same contract issues in any subsequent disputes between the parties.[19] Moreover, although the

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[19] See generally *Todd Shipyards Corp. v. Industrial Union of Marine & Ship Workers*, 242 F. Supp. 606, 611 (D. N.J., 1965); *Bittner v. Roadway Express, Inc.*, 246 F. Supp. 62, 64 (W.D. Pa., 1965). See also, *Panza v. Armco*, 316 F.2d 69, 70 (C.A. 3, 1963); *Flintkote Co.*, 41 LA 268, 273 (1963); Merrill, *A Labor Arbitrator Views His Work*, 10 Vand. L. Rev. 789, 797 (1957). Arbitration may be invoked over the grievances of individual employees, on behalf of all unit employees, as a "vehicle to test the propriety of [the employer's] policy." *Shahmoon Industries v. Steelworkers*, 263 F. Supp. 10, 17 (D. N.J., 1966); *I.A.M., Local 917 v. Air Prods. & Chem., Inc.*, 341 F. Supp. 874, 875 (E.D. Pa., 1972).

award is framed in declaratory terms, it clearly apprises the Company of what it is required to do or refrain from doing and thus would support a valid enforcement decree restraining future violations, in a suit brought under Section 301 of the Labor Management Relations Act.[20] Finally, as noted in the Board's brief in No. 74-1035, courts have inherent authority to enforce compliance with their lawful orders through civil contempt. *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966).

In challenging the adequacy of the arbitrator's award, the Union argues (Br. 33):

> Not only is the Company a recidivist offender against the Act, but it has previously engaged in violations of the same character as alleged in paragraph 8(b), namely, the unlawful withholding of information. . . . [Citing *United Aircraft Corp.*, 199 NLRB 658 (1972), enf'd., 490 F.2d 1105 (C.A. 2, 1973); *United Aircraft Corp.*, 192 NLRB 382, 390

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[20] See *I.A.M., Local 1790 v. Westinghouse Corp.*, 53 LRRM 3008, 3009 (D. Mass., 1963), where the court entered a decree requiring the employer to "cease and desist" from subcontracting its cleaning services in compliance with an arbitrator's award which merely stated, in declaratory form, that the subcontracting was in violation of the collective bargaining agreement. The court stated that the employer's "persistence in contracting out the cleaning services in question amounts to a refusal by the [employer] to abide by the award and constitutes a continuing violation of . . . the agreement. . . ." See also, *Dean Truck Line, Inc. v. Local 667 of Int'l Bro. of Teamsters, etc.*, 327 F. Supp. 1335, 1342 (N.D. Miss., 1971); *Local 719, American Bakery & C. Wkrs. v. National Biscuit Co.*, 378 F.2d 918, 925 (C.A. 3, 1967). Compare cases where the arbitrator's award was found to be ambiguous and was resubmitted for clarification: *I.B.E.W., Local 369 v. Olin Corp.*, 471 F.2d 468, 472 (C.A. 6, 1972). *Transport Workers Union, Local No. 234 v. Philadelphia Trans. Co.*, 228 F. Supp. 423, 426 (E.D. Pa., 1964). Arbitrators, of course, have "flexible" remedial powers and court review is narrowly circumscribed. *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960); *Mogge v. District 8, I.A.M.*, 454 F.2d 510, 514 (C.A. 7, 1971); *A.H. Belo Corp. v. Dallas Typographical Union*, 82 LRRM 2574-2575 (N.D. Tex., 1972), aff'd., 471 F.2d 651 (C.A. 5, 1973).

(1971), pets. to rev. and enf. pending (C.A. 2, Nos. 72-1935, 72-2310).] Thus, a broad order requiring the Company to provide relevant information to the representatives of its employees is essential to prevent repetition of the offense.

Initially, it should be noted that in neither of the cases cited by the Union did the Board find that the Company unlawfully withheld information.[21] But, in any event, as indicated *supra*, p. 22, legitimate differences may arise between an employer and a union on what information is relevant and reasonably necessary to the proper functioning of the collective bargaining relation. The Union cites no case in which the Board, as a remedy for an employer's refusal to furnish specified information, ordered the production, upon request, of all information of any description that might later be found relevant and necessary under the Act. Cf. *Vertol Division, Boeing Co.*, 182 NLRB 421 (1970). Nor did the Union propose to the Board that it issue such an order in this case.[22] In these circumstances, the Board was clearly not required to find the arbitrator's award repugnant to the Act because he failed to provide this remedy.[23]

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[21] However, in the second cited case (*United Aircraft Corp., supra*, 192 NLRB at 390), the Board found that the Union was not obliged to reimburse the Company for the cost of deleting employee addresses from certain materials it had furnished the Union because, in another case, the Board had found that the Company was required to furnish the Union with the names and addresses of employees in the unit. *United Aircraft Corp.*, 181 NLRB 892, 902-903 (1970), enf'd., 434 F.2d 1198, 1204-1207 (C.A. 2, 1971), cert. denied, 401 U.S. 993.

[22] Thus, although the Union argued before the Board that a "cease and desist order and notice posted" would be "clearly inadequate" (J.A. 113-[illegible]), it did not suggest what order would be sufficient.

[23] For the same reasons, there is no merit in the Union's contention (Br. 34) that the "extraordinary character" of the violation alleged requires a "broad order" and makes the arbitrator's award vulnerable under *Spielberg* – even assuming arguendo that the factors relied on by the Union establish an extraordinary violation. But see *supra*, pp. 30-31 nn. 18.

The Union's further contention (Br. 34) that the arbitration award provides no sanction for the violation found and leaves the Company with the fruits of its deliberate misconduct is also without merit. As shown *supra*, p. 24, the Company's course of conduct does not support the Union's suggestion that it sought to delay the processing of the underlying grievance to reap a supposed benefit by frustrating the Union in the performance of its function as collective bargaining representative.[24] Rather, it appears that the Company proceeded promptly to secure a determination under the contract on whether it was required to produce the materials in dispute, and that it was the Union's resistance to this procedure that has delayed the processing of the underlying grievance (J.A. 31-33, 71-72, 103). Any time a disagreement arises between an employer and a union on what information should be produced in connection with a pending grievance, there is a delay while the issue is being resolved. But the history of this litigation and of No. 74-1035 demonstrates that delay is minimized by proceeding through the contract machinery rather than invoking and exhausting the statutory procedures.

Moreover, contrary to the Union's contention, the arbitrator's award provides an effective sanction for the Company's refusal to furnish the foreman's notebooks. As shown *supra*, pp. 32-33, the award

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[24] The Union also contends that the fruits of misconduct retained by the Company under the award include its success in placing on the Union the expense of sharing the costs of the arbitration (Br. 34). That contention is out of place in this context. Whether or not the Board defers to the arbitrator's award under *Spielberg*, the Union is required to bear its equal share of the arbitration costs because it agreed to do so under the contract (J.A. 23, Art. VII, Sec. 3(i)). Providing the Union with an opportunity to relitigate the dispute before the Board and a reviewing court would scarcely reduce its costs. Moreover, the Union does not and cannot plead poverty as a justification for its reluctance to arbitrate the issues in this case and No. 74-1035.

constitutes a clear determination that the withholding of these materials is improper; that determination is enforceable through the courts as a directive to produce the materials withheld; and the enforcement decree will support a contempt order if the Company refuses to comply. See *Local Union 715, I.B.E.W. v. N.L.R.B. (Malrite), supra,* 494 F.2d at 1139.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition to review should be denied.

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March, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LODGES 700, 743, AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	
Petitioners	)	No. 74-2211
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 24th day of April, 1975.